



CAYMAN'S NEW FOUNDATION COMPANY

MAY 2017

If you want the best structure to manage property or conduct a business for the benefit of a family or to fund a philanthropic project or to carry out a plan of any kind whose goal is not simply to make money for members, please take a look at Cayman's new foundation company – introduced by the [Foundation Companies Law](#) which came into force on 18th October 2017.

A foundation company can be used for private, commercial or philanthropic purposes.

It has the well-known advantages of being a company and it is subject to long-established legislation.

It has great flexibility with regard to objects, management, supervision and everything else, enabling it to be tailor-made to the founder's plan and circumstances.

It has clear advantages over the trust, over the usual "not for profit" company, and over the foundation introduced in other offshore centres.

Comparing the Trust

In comparison with the trust the big difference is, of course, that a company is a legal person. No trustee is required. There are no complications inherent in a change of trustees.

All kinds of business and dispositive arrangement can be included in the constitution of a foundation company. Any task or power that can be given to a trustee can be given to a foundation company – and can be given on whatever terms the founder wishes.

Those who stand to benefit can be given the right to benefit, or the right to participate in the administration of the company, or the right to an accounting. The default rule, if the constitution is silent, is that beneficiaries have no rights.

The directors of a company have different duties to those of trustees, and owe them to the company, not the beneficiaries. Generally speaking it is less risky to manage a company than to administer a trust.

With a trust there are sometimes doubts as to validity, which can make life very difficult for everyone involved. But with a company the Registrar's certificate is conclusive.

With a trust there may well be uncertainty about how the courts of some foreign countries would treat the trust and the trustee; but nearly all countries have the concept of a company, so the risk of adverse treatment is much less.

Litigation risk is perhaps the biggest drawback of a trust; a company has a smaller risk of getting entangled in litigation, because the

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court has a smaller jurisdiction. And some settlors are uncomfortable with the idea that the court might be persuaded to give the trustee directions of which the settlor would not approve.

On the other side of the balance some planners value the special role of the courts with regard to trusts, and see it as the best assurance that the settlor's plan will not be derailed – even if it does add to costs.

Perhaps the client needs both options to be offered and explained.

Comparing the Usual "Not for Profit" Company

In Cayman law it has always been possible to form a company for special purposes and to include in its memorandum of association a clause prohibiting the payment of dividends to members as such. In some situations this can work well, especially if the objective is charitable or will be achieved while the founder is alive. But otherwise it suffers significant drawbacks – which the Foundation Companies Law seeks to overcome. It does so by modifying (in relation to foundation companies) the relatively few provisions of the Companies Law that put the members in the driving seat. For example:

- The constitution of a foundation company may entrench its objects, or impose conditions for amending them. The founder need not worry that one day members may derail his plan
- The founder may also entrench other provisions of the constitution. Powers of amendment or consent may be given to non-members
- If the constitution so provides, a foundation company may dispense with members altogether
- The founder may provide in the constitution for supervisors to keep an eye on the directors, or exercise any of the functions normally performed by members
- The constitution may grant rights, powers and duties of any description to the founder, the directors, the supervisors, the members or whomever else the founder wants. Complete flexibility
- The statutory contract binding a company and its members to the constitution is extended in the case of a foundation company to all persons to whom the constitution gives rights or powers
- If the objects of a foundation company include the giving of benefits to family or others, it is up to the founder to say in the constitution whether the beneficiaries are to have rights. The default rule is that they have none
- A foundation company may have bylaws to guide the exercise of discretion by directors, supervisors and other functionaries. This is not a public document
- The founder has the option of imposing an obligation upon the company itself to carry out the stated objects, but he must designate the persons who will have standing to bring an action against the company to enforce this obligation. A company which has such an obligation will have the same access to the court as a trustee to seek directions

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Comparing the Common Law Foundation

Cayman has not followed St. Kitts, the Bahamas, Jersey, Isle of Man, Guernsey and other offshore centres which in recent years have created new legal creatures emulating in some respects the ancient civil law foundation. It seemed better to us to modify the well-known company, rather than create a whole new set of rules to govern the new creature from A to Z, rules that would presumably take years for the courts to construe thoroughly.

In some cases the offshore legislation for foundations has apparent defects but in the best of them there are still points of uncertainty – inevitably so.

Most of the offshore legislation seems to suffer from other particular drawbacks:

- Restrictions on the activities of the foundation
- Inflexibility in terms of who owes duties to whom; and who has access to the court
- Wishful thinking that foreign courts and tax authorities will accept the statutory proposition that the foundation is not a trust – even when there are beneficiaries who are statutorily entitled to benefit and who have access to the courts to compel due administration
- Litigation risk, which is enlarged (even compared to a trust) by giving more people access to the court

The Foundation Companies Law includes a model form of constitution, to give examples of the arrangements that can be made.

If you have any queries, we would be happy to help answer your questions.

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